

BRB Nos. 91-0652

MICHAEL N. HALE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY	)	
COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision After Remand of James J. Butler, Administrative Law Judge, United States Department of Labor.

Michael N. Hale, Seattle, Washington, *pro se*.

Russell A. Metz (Metz, Frol & Jorgensen), Seattle, Washington, for the employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order After Remand (85-LHC-1235) of Administrative Law Judge James J. Butler denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). In reviewing this *pro se* appeal, we must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

Claimant alleged that he injured his back while working for employer as a marine electrician on January 6, 1981. Employer voluntarily paid claimant temporary total and permanent partial

disability compensation for various periods between October 23, 1981 and April 1983. Claimant sought a continuing award of permanent total disability compensation plus medical expenses resulting from the work injury.

In his initial Decision and Order, the administrative law judge denied the claim, finding that claimant's testimony concerning the events of January 6, 1981 was plainly incredible and that, while the event itself might have occurred, the injury alleged by claimant did not. In addition, the administrative law judge found that claimant failed to give employer timely notice of the alleged injury pursuant to Section 12 of the Act, 33 U.S.C. §912 (1988). Claimant's motion for reconsideration was summarily denied.

Claimant appealed the administrative law judge's denial of benefits to the Board. On appeal, claimant challenged the administrative law judge's findings regarding the occurrence of an injury on January 6, 1981, as well as his finding of untimely notice. Employer responded, urging affirmance of the administrative law judge's Decision and Order.

In its original Decision and Order in this case, the Board vacated the administrative law judge's causation analysis. The Board found that although the administrative law judge had rejected claimant's testimony based on the delayed onset of his back pain, his failure to seek immediate treatment from his chiropractor, his failure to report the event to his chiropractor or doctor, and his failure to report the event itself to employer until October 1981, and concluded that claimant was not injured, these factors were not relevant to whether claimant had an injury. Rather, the Board concluded that these factors related to whether the alleged accident occurred, an element of claimant's *prima facie* case, and to whether claimant's back condition is related to the alleged accident, an issue to which the Section 20(a), 33 U.S.C. §920(a,) presumption applies. From its review of the record, the Board determined that claimant did, in fact, have an "injury", *i.e.*, a harm, to his low back for purposes of his *prima facie* case, and stated that the administrative law judge erred in concluding otherwise. The Board also noted that although the administrative law judge indicated that claimant's testimony regarding the alleged accident was not credible, he inconsistently concluded that the event itself "might" have occurred. In light of the ambiguity in the administrative law judge's findings, the Board vacated his Decision and Order and remanded for him to determine specifically whether claimant has established that working conditions existed which could have caused the harm alleged so as to establish a *prima facie* case for application of Section 20(a). The Board instructed the administrative law judge that, if he determined on remand that claimant had established his *prima facie* case, he was to then consider whether employer had rebutted the Section 20(a) presumption, and if so, weigh all of the relevant evidence and resolve the causation issue based on the record as a whole.

The Board also vacated the administrative law judge's finding that claimant had failed to provide employer with timely notice of his injury pursuant to Section 12(a) and (d), 33 U.S.C. §912(a),(d). The Board noted that the administrative law judge assumed that claimant had, in fact, sustained a work-related back injury on January 6, 1981, and then concluded that as claimant had not

provided notice within 30 days of that date, employer obviously had been prejudiced. In vacating this finding, the Board noted that the administrative law judge failed to determine the specific date on which claimant became aware or in the exercise of reasonable diligence should have been aware of the relationship between his injury, his employment and his disability pursuant to Section 12. Based on its review of the record, the Board noted that claimant testified he did not become aware of the relationship between his low back condition and his employment until after he met with a physician on October 1, 1981, and that he thereafter immediately informed employer of his injury and the January 6, 1981 incident on October 2, 1981. Based upon the administrative law judge's failure to consider the date upon which claimant became aware of the relationship between his alleged injury and his employment, the Board vacated his determination that claimant's notice to employer was untimely and instructed the administrative law judge that if he found that claimant has a work-related back condition on remand, he must determine whether claimant gave employer timely notice pursuant to Section 12(a) of the Act or whether the failure to give such notice was excused under Section 12(d)<sup>1</sup>.

In his Decision and Order on Remand, the administrative law judge initially stated that he "discounted claimant's whole account of the supposedly precipitating event on January 6, 1981," based on claimant's lack of credibility for the reasons stated in his initial Decision and Order. Decision and Order on Remand at 1-2. The administrative law judge further stated that he was "still not convinced that claimant suffered some lasting insult to his back on the date alleged" and that he did not "believe that the [Section 20(a)] presumption ever arose in [claimant's] favor or that the burden to prove the non-existence of any presumed fact ever shifted to the employer." *Id.* at 2. The administrative law judge further concluded that much more important than his findings regarding the merits of the claim was his determination that the injury claimed was not timely reported. The administrative law judge rejected the assertion that claimant first became aware of the link between the alleged accident of January 6, 1981, and his back condition during his examination by Dr. Burns on October 1, 1981, because he found that claimant never informed Dr. Burns of the alleged incident and that Dr. Burns first learned of the alleged incident four years later during the course of his deposition. The administrative law judge further determined that the fact that Dr. Burns had not been made aware of the alleged incident was in fact prejudicial to employer in that if Dr. Burns had known, he could have diagnosed or treated claimant accordingly. The administrative law judge characterized claimant's most recent visit with Dr. Burns as a necessary excuse for his long overdue report of any such event and the link to claimant's current back symptoms.

The administrative law judge further determined that if claimant had believed that there was some relationship between his back symptoms and an event at work on January 6, 1981, he would have at least mentioned this to Dr. Burns or to his treating chiropractor, Dr. Sherwood, at some time

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<sup>1</sup>Failure to provide timely notice as required by 33 U.S.C. §912(a) will bar a claim unless excused under Section 12(d), 33 U.S.C. §912(d)(1988). Under Section 12(d) as amended in 1984, the failure to provide timely notice will not bar a claim if claimant shows either that employer had knowledge of the injury or that employer was not prejudiced by the failure to give timely notice. 33 U.S.C. §912(d)(1), (2) (1988). *See generally Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

during the course of his treatment, which began on February 21, 1981. The administrative law judge also inferred from testimony provided by the claimant that he was immediately aware that something had happened in his injury-prone lower back and determined that, as claimant had suffered five previously reported work-related aggravations in the same area of his spine, if the alleged injury had actually occurred, claimant, would have timely reported it to his foreman and/or the company dispensary as he had done in the past. Finally, the administrative law judge rejected the argument made by claimant in his *pro se* motion for reconsideration of the original Decision and Order that he was not aware of the nature and extent of his alleged January 6, 1981, injury until he saw Dr. Burns on October 1, 1981. The administrative law judge found that claimant wrongly assumed his disc herniation was traumatically induced and that his wait to assign this problem to a single precipitating event had been a mistake. The administrative law judge thus concluded that as claimant's account of his injury was "incredible, untimely reported, and medically unsubstantiated," his claim was denied.

Claimant, appearing without representation, appeals the administrative law judge's denial of benefits on remand. Employer responds, urging affirmance of the administrative law judge's denial of benefits. After review of the Decision and Order After Remand in light of the evidence of record, we affirm the administrative law judge's denial of benefits based on his finding that claimant failed to establish a *prima facie* case under Section 20(a), as it is rational and supported by substantial evidence. See *O'Keeffe*, 380 U.S. at 359. In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 248, 253 (1988).

In the Board's initial decision remanding the case, the administrative law judge's finding that no injury occurred under Section 20(a) based on his negative assessment of claimant's credibility could not be affirmed because he relied on factors which were relevant to whether the alleged accident occurred, such as the delayed onset of claimant's pain and his failure to timely seek treatment or report the incident to his doctors or employer. The Board remanded for the administrative law judge to consider explicitly whether claimant had established the existence of working conditions which could have caused the harm alleged, as he had ambiguously concluded that the "event itself might have occurred." On remand, the administrative law judge found that the accident alleged did not occur and cited the reasons he had previously given regarding claimant's lack of credibility in his initial Decision and Order. Inasmuch as the factors cited by the administrative law judge are relevant to the question of whether the incident alleged occurred, it cannot be said that the administrative law judge's finding that the incident alleged did not occur is inherently incredible or patently unreasonably based on his negative assessment of claimant's credibility in light of these factors. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 111 (CRT) (5th Cir. 1992); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). As such credibility determinations are within the purview of the

administrative law judge, and as the administrative law judge fully reviewed the record, we affirm the denial of benefits in this case. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Inasmuch as we affirm the administrative law judge's denial of benefits based on his finding that causation was not established, we need not address the propriety of his finding that the notice provided to employer was untimely under Section 12.

Accordingly, the administrative law judge Decision and Order After Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge